IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM MARCHIONNI,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 98-6491
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, G. ROGER BOWERS, Esq., THOMAS CAIN, JOSEPH J. DEVANNEY, Esq. PETER DIACZENKO, EILEEN KATZ, Esq. VINCENT J. WALSH, Esq.	:	
	:	
Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. June 7, 2000

Presently before the Court is the Defendants' Motion for Summary Judgment. For the reasons stated below, the Motion is Granted in its entirety.

I. PROCEDURAL HISTORY

On December 5, 1996, Plaintiff William Marchionni's ("Plaintiff") employment with Defendant Southeastern Pennsylvania Transportation Authority ("SEPTA") was terminated. On November 5, 1998, Plaintiff initiated this action in the Court of Common Pleas, Philadelphia County, by filing a Praecipe and Writ of Summons. SEPTA removed the case to this Court on November 14, 1998. No further action was taken regarding this case until October 30, 1999, when SEPTA filed a Motion to Compel Plaintiff to File a Complaint. Plaintiff filed the

Complaint on November 5, 1999, naming SEPTA and six of its officials as Defendants.[1] Apparently, the clerk's office was assigned an incorrect docket number. On January 28, 1999, this Court granted an Order stating that all pleadings filed in William Marchionni v. SEPTA were to be considered *nunc pro tunc* to have been filed under the correct civil action number. This Court, therefore, recognized that the Plaintiff's Complaint was filed on November 5, 1999. An Order dated February 3, 2000 dismissed Count III of the Complaint.

II. FACTUAL BACKGROUND

Plaintiff began working for SEPTA in 1983 and was promoted to maintenance manager in 1989. On October 4, 1996 and November 1, 1996, SEPTA investigators observed two union employees under Plaintiff's supervision retrieve envelopes containing money and football pools from the Hospital at the University of Pennsylvania. Mr. Marchionni was given informal hearings concerning these incidents at which he admitted running a "football betting pool" during working hours. Eventually, he was terminated on December 5, 1996. Plaintiff requested and received a post-determination hearing to challenge the basis for his discharge. On February 28, 1997, Defendant Thomas Cain, Esq. ("Cain"), issued an opinion and decision upholding Plaintiff's discharge from employment.

Plaintiff challenged the constitutionality and fairness of the hearing process in the Philadelphia Court of Common Pleas. The Honorable Stephen Levin ordered a new hearing for Plaintiff on July 29, 1997 which required SEPTA to appoint a "new hearing examiner and an independent counsel to the hearing examiner .... who shall not be an employee of SEPTA". The

1. The officials included, G. Roger Bowers, Esq., Thomas Cain, Esq., Joseph J. Devanney, Esq., Peter Diaczenko, Eileen Katz, Esq. and Vincent J. Walsh, Esq. (collectively, the "Individual Defendants").

Defendant agency appealed this order to the Commonwealth Court which ruled in favor of Plaintiff in August, 1998. SEPTA's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on March 8, 1999. A new hearing was scheduled in November, 1999, but the SEPTA- appointed hearing examiner, Charles Burns, resigned after Plaintiff objected to him. Thereafter, Judge Levin entered an order, over Plaintiff's objection, that retired Judge Louis Hill should serve as the hearing examiner. Plaintiff appealed this Order to the Commonwealth Court which quashed the appeal on March 21, 2000. A new post-termination proceeding has not been held. There is nothing of record to suggest that defendant is hindering this proceeding. Plaintiff also asserts that he was terminated because he refused to cooperate with SEPTA officials in their allegedly unfounded investigation of an attorney, Robert A. Kossef.[2]

III. LEGAL STANDARD

Rule 56 allows the trial court to grant summary judgment if it determines from its examination of the allegations in the pleadings and any other evidential source available that no genuine issue as to a material fact remains for trial, and that the moving party is entitled to judgment as a matter of law. The purpose of the rule is to eliminate a trial in cases where it is unnecessary and would only cause delay and expense. Goodman v. Mead Johnson & Co., 534 F.2d 566,573 (3d. Cir. 1976). In evaluating a summary judgment motion, the court may examine the pleadings and other material offered by the parties to determine if there is a genuine issue of material fact to be tried. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Movant "bears the initial responsibility of informing the court of the basis for its

2. Plaintiff alleges that he was terminated because he refused to cooperate with SEPTA officials in an investigation of Robert Kossef, an attorney who represented several railroad employees in various law suits.

motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact". Celotex, 477 U.S. at 323. When movants do not bear the burden of persuasion at trial, they need only point to the court "that there is an absence of evidence to support the nonmoving party's case. Id. at 325. Not every disputed fact, but only those which are material, necessitate a trial. A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment motions require judges to assess on a case by case basis how one-sided evidence is or what a fair-minded jury could reasonably decide. See Williams v. Borough of West-Chester, Pa., 89 F.2d 458 (3d Cir. 1989) (Plaintiff's presentation of "some" evidence is not necessarily enough to survive summary judgment).

IV. DISCUSSION

A. Procedural Due Process Claims

Plaintiff seeks relief for violations of his procedural due process rights under § 1983 and the Pennsylvania Constitution. The Plaintiff's claim relies on the findings of the Pennsylvania state courts that his initial post-determination hearing was unconstitutional. The Plaintiff argues that the delay in providing a post-deprivation hearing within a meaningful time violates due process.

The Due Process Clause requires provision of a hearing "at a meaningful time." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See Cleveland Board of

Education v. Loudermill, 470 U.S. 532, 547 (1985) (nine month adjudication not unconstitutional delay). A procedural due process violation is not complete "unless and until the State fails to provide due process." Zinermon v. Burch, 494 U.S. 113, 125 (1990). In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under §1983 arise. See McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994). Generally speaking, "procedural errors are cured by holding a new hearing in compliance with due process requirements." Batanic v. Immigration and Naturalization Service, 12 F.3d 662, 667 (7th Cir.1993).

As of this date, Plaintiff has not been accorded a meaningful post-deprivation hearing. Plaintiff was originally terminated in December, 1996. Less than seventh months later, a Court had ordered SEPTA to give Plaintiff a new “hearing”. SEPTA appealed this ruling and it was almost two years before a final decision before the Pennsylvania Supreme Court denied SEPTA’s petition for appeal. It is an unfortunate part of our legal system that people must often put their lives on “hold” while awaiting the outcome of judicial appeals. Therefore, the Court can not attribute the twenty month period between Judge Levin’s order and the denial of Defendants’ Petition to the Supreme Court as time in which SEPTA delayed providing Plaintiff with a meaningful post-deprivation hearing. Since March, 1999, SEPTA has attempted to comply with Judge Levin’s original July 1997 Order. Each time Plaintiff objected to the hearing examiner appointed. When Judge Levin appointed Judge Hill as hearing examiner, Plaintiff appealed the Order. This is not to say that Plaintiff did not have reason to object or appeal. However, Plaintiff is responsible for some of the delays involved in scheduling a fair post-

deprivation hearing. Therefore, the Court finds as a matter of law that Plaintiff has failed to show a deprivation of his procedural due process rights.

B. Injunctive Relief

In Count II of the Complaint, Plaintiffs request that a TRO be granted which would reinstate Plaintiff to his position with SEPTA and further enjoin Defendants from proceeding with the administrative procedures outlined in SEPTA Policy 6.6.2. Federal Courts should abstain from enjoining state administrative proceedings "in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiffs would have a full and fair opportunity to litigate the constitutional claims. See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 627 (1986). In this case, state administrative proceedings are still ongoing. The proceeding is judicial in nature, and important state interests will be adjudicated. Plaintiff will also have the opportunity to appeal the decision of the administrative panel. Plaintiff argues that there abstention is not appropriate because any post-deprivation hearing that does take place will already be unconstitutional because of the delay he has experienced. However, as stated above, the Court does not find that Plaintiff's constitutional due process rights have been violated. Therefore, the Court will not enjoin the administrative proceeding.

C. Retaliation

In Count I of the Complaint, Plaintiff asserted a first amendment retaliation claim under § 1983. The Third Circuit articulated its test for a public employee's retaliation claim in Green v. Philadelphia Housing Authority, 105 F.3d 882, 885 (3d. Cir. 1997):

> "A plaintiff must first demonstrate the activity in question was protected. Second, the plaintiff must show the protected activity was a substantial or motivating factor in the alleged retaliatory action. Finally, defendants may defeat plaintiff's claim by demonstrating that the same action would have been taken even in the absence of the protected conduct."

In order to qualify as a protected activity, Plaintiff's activity must constitute "speech ... on a matter of public concern." Watters v. City of Philadelphia, 55 F.3d 886, 892. Second, the public interest favoring his expression "must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees." Id. A public employee's speech involves a matter of public concern if it can "be fairly considered as relating to any matter of political, social, or other concern to the community." Connick v. Myers, 461 U.S. 138, 146 (1983). "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment". Id. In the Complaint, Plaintiff claims that his recommendation of the services of Robert Kossef, Esq. and his refusal to cooperate in SEPTA's investigation of Kossef were protected activity. Defendants point to the fact that this activity is more fairly characterized as matters of private concern. Plaintiff did not do or say anything that would bring to the public's attention actual or potential wrongdoing or breach of public trust on the part of SEPTA. See Connick, 461 U.S. at 147. The Plaintiff does not argue this point, essentially conceding the issue to Defendant.[3]

---

3. The Defendant has attached as an exhibit a letter dated April 26, 2000 from Plaintiff to Defendants stating the Mr. Marchionni was prepared to stipulate dismissal of all but Plaintiff's due process claims. However, since this stipulation has not yet been entered, the Court addresses the issue.

Therefore, since Plaintiff has not demonstrated that he engaged in protected activity, summary judgment will be granted to the Plaintiff.

V. CONCLUSION

The Court has granted summary judgment to Defendants on Plaintiffs' constitutional claims and demand for injunctive relief. Therefore, Plaintiffs' requests for punitive damages and attorneys' fees will likewise be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM MARCHIONNI,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 98-6491
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, G. ROGER BOWERS, Esq., THOMAS CAIN, JOSEPH J. DEVANNEY, Esq. PETER DIACZENKO, EILEEN KATZ, Esq. VINCENT J. WALSH, Esq.	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this 7th day of June, 2000, upon consideration of the Defendants' Motion for Summary Judgment (Docket No. 18), and the Plaintiff's Response thereto (Docket No. 23); it is hereby **ORDERED** that Defendants' Motion is **GRANTED** and that Summary Judgment is entered in favor of the Defendants and against the Plaintiff.

This case shall be marked **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.